STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS E. NOWLIN, Plaintiff-Appellant,	UNPUBLISHED November 14, 2000
v	No. 219045 Jackson Circuit Court
MICHIGAN AUTOMOTIVE COMPRESSOR, INC., Defendant-Appellee.	LC No. 98-089573-CZ

DOUGLAS E. NOWLIN, Plaintiff-Appellee,	
v	No. 219107 Jackson Circuit Court
MICHIGAN AUTOMOTIVE COMPRESSOR, INC., Defendant-Appellant.	LC No. 98-089573-CZ

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In these consolidated cases arising from the same lower court case, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant on plaintiff's claim of discrimination based on disability. Defendant appeals as of right the trial court's denial of defendant's motion to compel payment of expert witness fees. We affirm the trial court's grant of summary disposition, but reverse and remand with regard to expert witness fees.

This case arises from plaintiff's claim that his employer, defendant Michigan Automotive Compressor, Inc., discriminated against him based on a disability because it would not allow plaintiff to change from the night-shift to the day-shift. In his complaint, plaintiff alleged that defendant violated the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq.*; MSA

3.550(101) *et seq.*,[1] by directly or constructively discharging him based on his disability and by refusing to provide a reasonable accommodation for his disability.

In Docket No. 219045, plaintiff argues that the trial court erred in granting summary disposition in favor of defendant because 1) defendant failed to identify the grounds on which it based its motion for summary disposition; 2) the motion was granted prematurely where discovery was not completed; and 3) genuine issues of material fact remain concerning whether plaintiff was disabled.

We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Russell v Dep't of Corrections*, 234 Mich App 135, 136; 592 NW2d 125 (1999). Motions under MCR 2.116(C)(10) test whether there is factual support for the plaintiff's claim. *Spiek, supra*. This Court must review the record in the same manner as the circuit court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). The court considers the affidavits, pleadings, depositions, admissions and other evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant trial. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

Plaintiff first claims that the trial court should have denied summary disposition because defendant failed to state the grounds on which the motion was based. This argument is without merit because it was apparent from the motion and brief that the motion was pursuant to MCR 2.116(C)(10). *Tumbarella v The Kroger Co*, 85 Mich App 482, 488-489; 271 NW2d 284 (1978). Even so, defendant corrected this oversight in its reply brief in support of its motion for summary disposition, and thus the trial court did not err in deciding defendant's motion for summary disposition despite defendant's initial oversight.

Plaintiff also argues that defendant's motion for summary disposition should have been denied as premature because defendant filed this motion before the close of discovery. "'As a general rule, summary disposition is premature if granted before discovery on a disputed issue is complete.' 'However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion.'" *Village of Dimondale v Grable*, 240 Mich App 553, 566; ___ NW2d ___ (2000) (citations omitted). A party opposing a motion for summary disposition on the ground that discovery is incomplete "must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). A party may show that a grant of summary

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[1] Although the parties refer to and use terminology in the Michigan Handicappers' Civil Rights Act (MHCRA), plaintiff filed this action after the Legislature amended the act in March 1998, which resulted in changes both to the name of the act and to some of the nomenclature in the act without changing the substantive language of the act. Throughout this opinion, we refer to the act under its new name, the Persons with Disabilities Civil Rights Act (PWDCRA), and to the new terminology in the amended act.

disposition would be premature through an affidavit pursuant to MCR 2.116(H). *Hyde v Univ of Mich Bd of Regents*, 226 Mich App 511, 519; 575 NW2d 36 (1997).

In the present case, the trial court did not err in deciding defendant's motion for summary disposition before discovery was complete. Plaintiff failed to show additional discovery would uncover factual support on the issue of whether plaintiff is disabled. Plaintiff produced no affidavit pursuant to MCR 2.116(H), nor asserted that additional testimony or evidence would show that plaintiff is disabled under the PWDCRA. Hence, we find no error.

Next, plaintiff argues that genuine issues of material fact remain concerning whether plaintiff was disabled. To establish a prima facie case of discrimination under the PWDCRA, a plaintiff must show (1) that he is disabled as defined by the PWDCRA, (2) that the disability is unrelated to his ability to perform the duties of a particular job, and (3) that he was discriminated against in one of the ways described in the statute. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999); *Lown v JJ Eaton Place*, 235 Mich App 721, 727; 598 NW2d 633 (1999). As relevant herein, the PWDCRA defines a "disability" as:

> A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
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> (A) . . . substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion. [MCL 37.1103(d)(i)(A); MSA 3.550(103)(d)(i)(A).]

This Court has noted that the United States Supreme Court's test for determining whether a plaintiff has a disability under the Americans with Disability Act (ADA), 42 USC § 12101 *et seq*, "tracks closely the language found in the PWDCRA definition of a disability and is thus reasonably well-suited for determining the existence of a disability under the PWDCRA." *Chiles, supra* at 474-475. The Supreme Court explained:

> First, we consider whether respondent's [complaint] was a physical impairment. Second, we identify the life activity upon which respondent relies ... and determine whether it constitutes a major life activity under the ADA. Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity. [*Bragdon v Abbott*, 524 US 624, 631; 118 S Ct 2196; 141 L Ed 2d 540 (1998).]

Under the third prong, it is not enough for an impairment to affect a major life activity; rather, the plaintiff must proffer evidence from which a reasonable inference can be drawn that such activity is substantially limited. *Chiles, supra* at 479. Because of definitional similarities between the PWDCRA and the ADA, it is appropriate to look at the ADA and cases interpreting the ADA for guidance in determining "substantially limits" and "major life activities." *Stevens v Inland Waters, Inc*, 220 Mich App 212, 217; 559 NW2d 61 (1996). A court must examine a plaintiff's impairment as it exists with the benefit of medication when deciding whether the impairment

constitutes a disability. *Chmielewski v Xermac, Inc*, 457 Mich 593, 605-607; 580 NW2d 817 (1998).

In the present case, plaintiff argues that his physical impairments, consisting of attention deficit disorder (ADD) and dysthymic disorder, constitute disabilities and could support a jury finding that plaintiff "suffers from a substantially limiting [disability] while medicated." However, plaintiff testified that, with the benefit of medication, he has no problems with many major life activities, including performing manual tasks and caring for himself. The problems he stated that he continued to experience even while medicated included minor problems with learning, punctuality, cleaning up things at home and sleeping. Because plaintiff was not substantially limited by these problems more than an average person, his impairment does not rise to the level of a disability under the PWDCRA. See *Price v National Bd of Examiners*, 966 F Supp 419, 427-428 (SD W Va, 1997) (holding that students who suffered from ADD were not disabled when the evidence failed to show that the students could not learn as well as the average person). The evidence, including plaintiff's own deposition, reveals that plaintiff was performing his job in a satisfactory manner, with the benefit of medication, and his condition did not substantially limit his job performance any more than an average person's.[2] *Blackston v Warner-Lambert Co*, ___ F Supp ___ (ND Ala, 2000). Moreover, the record reveals that plaintiff is not precluded from performing a broad range of jobs. *Stevens, supra* at 218. In sum, the trial court's grant of summary disposition in favor of defendant was proper.

In Docket Number 219107, defendant argues that the trial court erred when it denied defendant's motion to compel payment of expert witness fees pursuant to MCR 2.302(B)(4)(c)(i). We agree. The facts and circumstances leading to this error are as follows.

After litigation commenced, plaintiff deposed defendant's expert, David J. Forsythe, M.D., P.C. Plaintiff noticed the deposition pursuant to MCR 2.306 as a lay witness deposition, including a $6.00 check for witness fees. By letter, defendant's attorney informed plaintiff's attorney that Dr. Forsythe's charge for the deposition would be $400 per hour. Later, in defendant's responses to plaintiff's first set of interrogatories, defendant identified Dr. Forsythe as an expert that it may call at trial. In another letter, defendant again informed plaintiff's attorney of Dr. Forsythe's fee for the deposition and, in response, plaintiff's attorney sent a letter explaining that defendant was obligated to pay Dr. Forsythe's fee because defendant noticed his deposition as that of a lay witness. At the outset of the deposition, plaintiff's attorney expressly stated that Dr. Forsythe had been identified as an expert and would be called at trial by defendant. Days later, defendant filed a preliminary witness list identifying Dr. Forsythe as a psychiatric expert.

At the hearing on defendant's motion to compel, plaintiff claimed that because he did not depose Dr. Forsythe as an expert witness, plaintiff was not obligated to pay expert witness fees to

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[2] To the extent that plaintiff relies on affidavits to support his claim of disability, these affidavits cannot create an issue of fact. The affidavits contradict clear evidence presented during plaintiff's deposition testimony, which was given well before the affidavits were produced. *Palazzola v Karmazin Products Corp*, 223 Mich App 141, 155; 565 NW2d 868 (1997).

him. Plaintiff argued that Dr. Forsythe admitted during the deposition that he had not met with defendant's attorney before the time of the deposition, that Dr. Forsythe did not know what the case was concerning, and that he had not formed expert opinions after the lawsuit was filed. Finding that Dr. Forsythe was not an expert on the basis that Dr. Forsythe was unaware of the nature of the case during the deposition, the trial court denied defendant's motion to compel fees. This appeal ensued.

This issue entails a review of the trial court's findings of fact and interpretation of a court rule. A trial court's findings of fact are reviewed for clear error. MCR 2.613(C); *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 8; 596 NW2d 620 (1999). "A finding is clearly erroneous when, although there is evidence to support it, this Court is left with the definite and firm conviction that a mistake has been made." *Id.* at 9. This Court reviews the interpretation of a court rule de novo as a question of law. *In re Contempt of United Stationers Supply Co*, 239 Mich App 496, 501; 608 NW2d 105 (2000). When interpreting court rules, the same basic principles governing statutory interpretation apply. *Bush v Mobil Oil Corp*, 223 Mich App 222, 226; 565 NW2d 921 (1997). "A court rule should be construed in accordance with the ordinary and approved usage of its language in light of the purpose the rule seeks to accomplish." *Id.*

To obtain payment of witness fees for an expert, a party must provide evidence that the witness was an expert. See *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 682; 444 NW2d 534 (1989). A witness qualified as an expert based on his or her knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise. MRE 702. An expert is permitted to base his or her opinion on the facts or data perceived by or made known to the expert at or before the hearing. MRE 703.

Defendant hired Dr. Forsythe before any litigation commenced to give his opinions concerning plaintiff's medical condition. A review of Dr. Forsythe's deposition testimony reveals that plaintiff asked Dr. Forsythe's opinion beyond what the doctor had already reported in his letters to defendant. Plaintiff asked the doctor about his opinions and conclusions regarding plaintiff's medical condition and his ability to work. Thus, the record reveals that despite the deposition being noticed as a lay witness deposition, plaintiff deposed Dr. Forsythe as an expert, not merely as a lay witness. Although plaintiff claims on appeal that the decision to notice the deposition pursuant to MCR 2.306(A) and (B) as a lay witness deposition was unrelated to defendant's decision to list Dr. Forsythe as an expert witness, it is not opposing counsel's role to dictate the status of an opposing party's witness. MCR 2.302(B)(4)(a)(ii) provides that a "[a] party may take the deposition of a person *whom the other party expects to call as an expert witness at trial*." [Emphasis supplied.] Because defendant identified Dr. Forsythe as its expert and because plaintiff clearly solicited expert opinions from the doctor during his deposition, we find that the trial court clearly erred in finding that Dr. Forsythe was not an expert.

Having determined that the trial court clearly erred in concluding that Dr. Forsythe was not an expert witness, we look to MCR 2.302, which covers the scope of discovery, to determine whether plaintiff was required to pay Dr. Forsythe's deposition fee.

MCR 2.302 provides in relevant part:

> (4) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
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> * * *
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> (a)(ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial.
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> * * *
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> (c) Unless manifest injustice would result
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> (i) the court shall require that the party seeking discovery under subrules (B)(4)(a)(ii) or (iii) or (B)(4)(b) pay the expert a reasonable fee for time spent in a deposition, but not including preparation time . . . .

Because Dr. Forsythe was an expert, plaintiff was required to pay the expert a reasonable fee for his time spent in deposition unless manifest injustice would result. *Id.* Thus, we remand to the trial court for a determination as to whether manifest injustice would result if plaintiff were ordered to pay Dr. Forsythe's deposition fee and, if no manifest injustice would result, to determine if Dr. Forsythe's requested fee is reasonable and for entry of an order requiring plaintiff to pay Dr. Forsythe the reasonable fee decided by the court.

Affirmed in part, reversed and remanded in part for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey